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before the

HOUSE NATURAL RESOURCES COMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

"Supreme Court Decision Carcieri v. Salazar Ramifications to Indian Tribes"

April 1, 2009

Mr. Chairman and members of the Committee, I am Michael J. Anderson of the Washington, DC law firm of AndersonTuell, LLP. I am here today to present testimony based in part on my tenure at the United States Department of the Interior as Associate Solicitor for Indian Affairs and Deputy Assistant Secretary for Indian Affairs, respectively, from 1993 to 2001. This written statement is submitted for the record and offers the following points:

- Carcieri v. Salazar overturns nearly 75 years of settled land into trust policy by limiting the Secretary of Interior's authority to accept land into trust for those American Indian Tribes "under federal jurisdiction" in 1934.
- While virtually all American Indian Tribes were "under federal jurisdiction" under the proper interpretation of that term, the Carcieri decision does not articulate a test or standard for resolving that question.
- It is inevitable that some private groups will argue that many recognized tribes should be excluded, and the Department of Interior could potentially face dozens of lawsuits. It is possible that, facing such litigation, or possibly after erroneous decisions by the lower courts, the Department will be compelled to examine the historical record for individual tribes.
- The Department is ill-equipped to make such determinations due to a lack of resources.
- The decision is creating confusion within federal agencies and Indian Country.

- Carcieri is contrary to modern Congressional and Executive support for American Indian self-determination, Native Nation-building, and treating all Tribes the same with respect to authorities of the Secretary of Interior.
- Congress should act now to restore the Secretary's authority to accept land into trust for all American Indian Tribes and all other Secretarial authorities potentially affected by the decision.
- Until Congress acts, it should urge the Attorney General, the Secretary of the Interior and the Chairman of the National Indian Gaming Commission to interpret the Carcieri decision in a manner that does not disturb past federal agency decisions and that maximizes the Secretary's current authority.

I. PURPOSES OF THE IRA

The Supreme Court decision Carcieri v. Salazar[1] runs directly counter to federal laws and policies that have long expressly supported self-determination for American Indian Nations. The Indian Reorganization Act of 1934 was intended to improve the political, cultural, and economic status of Tribes by ending fifty years of forced assimilation initiated by the General Allotment Act of 1887,[2] described by President Theodore Roosevelt as a "mighty pulverizing engine to break up the tribal mass."[3] The IRA gave authority to the Secretary of Interior to acquire new or repurchase former tribal lands on behalf of all Indian tribes.[4] The purpose behind the new tribal land-acquisition policy was to encourage tribal self-governance and promote tribal self-determination and economic development.

Since 1934, approximately six million acres of land have been acquired in trust for American Indian tribes.[5] The use of those lands by tribes has promoted tribal self-

[1] -- U.S. --, 129 S.Ct. 1058 (2009) ("Carcieri").
[2] 24 Stat. 388
[3] President Theodore Roosevelt. *First Annual Message* (Dec. 3, 1901). John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). http://www.presidency.ucsb.edu/ws/?pid=29542.
[4] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005 ed.), § 1.05.
[5] U.S. General Accountability Office. *BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Process of Land in Trust Applications*. GAO-06-781 (July 2006), pp. 8-9.

determination and well-being through uses as diverse as for health centers, government offices, and tribal cultural facilities. Moreover, such lands play a role in a wide range of economic activities whose benefits spill beyond tribes themselves to surrounding, non-Indian communities; such economic activities include agriculture, energy resources development, housing, clinics, and sacred site protection.

II. BACKGROUND OF CARCIERI

Carcieri v. Salazar, which construed Section 19 of the Indian Reorganization Act of 1934[6] ("IRA"), overturns nearly 75 years' of well-settled legislative, judicial, and administrative policy and precedent with respect to the authority of the Secretary of Interior to accept land in trust for Indian Tribes. The decision held that for purposes of the IRA, the Secretary of Interior's authority to take land into Trust for a tribe is limited to those tribes "under federal jurisdiction when the IRA was enacted in 1934."[7] Justice Thomas wrote the majority opinion. Justice Breyer joined the opinion but filed a concurrence. Justice Souter concurred in part and dissented in part joined by Justice Ginsburg. Justice Stevens dissented.

The Supreme Court reversed the First Circuit's determination that "now under federal jurisdiction" applies to all currently recognized tribes and continues a trend wherein the Supreme Court reverses favorable interpretation of Indian rights from the Circuit Courts.[8] The Supreme Court's majority opinion did not set forth a test as to what "under federal jurisdiction" in 1934 encompasses, but ruled that it did not apply to the Narragansett Indian Tribe where in the majority's view the Tribe itself did not argue or contest that it was not under federal jurisdiction in 1934. Manifestly unfair to the Narragansett, the majority did not remand the case back to the First Circuit to allow the

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[6] 48 Stat. 984, *codified as amended at* 25 U.S.C. § 461 et seq.

[7] Carcieri at 1061.

[8] See, e.g., David H. Getches, BEYOND INDIAN LAW: THE REHNQUIST COURT'S PURSUIT OF STATES' RIGHTS, COLOR-BLIND JUSTICE AND MAINSTREAM VALUES, 86 Minn. Law. Rev. 267, 280 (2001) (of forty Indian law cases decided by the Supreme Court between 1986 and 2001, tribal interests prevailed 22.5% of the time, a success rate lower even than that of convicted criminals).

Tribe an opportunity to demonstrate that it was in fact under federal jurisdiction in 1934. Without explanation, the Supreme Court also ignored Congress' amendments to the IRA in 1994 stating:

> **(f) Privileges and immunities of Indian tribes; prohibition on new regulations:** Department or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.[9]

CONCERNS RAISED BY CARCIERI DECISION

By upending well-settled expectations, Carcieri is already creating confusion in Indian Country and within the Department of Interior, the National Indian Gaming Commission, and the Department of Justice. As a result, it will undoubtedly lead to delays, increased costs, and new legal challenges in the already cumbersome fee-to-trust process[10]. Dozens of pending land-into-trust applications may have to be reconsidered in the wake of the Supreme Court's ruling, dashing the hopes of tribes whose well-being depends on timely administrative action. There are already reports of vague directives from the Bureau of Indian Affairs requesting tribal confirmation of their jurisdiction under the IRA. Hindering the prospects for tribal economic development and self-determination during the worst economic downturn for generations, the economic consequences of Carcieri could prove irreversible.

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[9] 25 U.S.C. § 476(f).

[10] See U.S. General Accountability Office, "Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Process of Land in Trust Applications," GAO-06-781 (July 2006).

While all tribes with established reservations should be appalled by the Carcieri decision, landless tribes may have the most to fear. Without a land base in trust, an Indian Nation's sovereignty over territory is virtually non-existent and its powers as a domestic Nation are severely compromised. With a land base, an Indian Nation can protect sacred places, create a homeland, foster economic development and employment. When Indian Nations do well, entire communities do well.

The decision in Carcieri illustrates once again the modern Supreme Court's rejection of time-honored and well-founded policies for American Indian Tribes. The many concerns raised by Carcieri are compounded by the Supreme Court's issuance of a new test of "under federal jurisdiction" in 1934. Without explanation or analysis, the majority simply held that the Narragansett Indian Tribe would have been unable to satisfy this newly established criterion back in 1934. In contrast to the majority's vague articulation (or more properly non-articulation) of a standard for what constitutes "under federal jurisdiction," the concurring opinion of Justice Breyer at least set forth a non-exclusive list of examples of what might provide evidence of being "under federal jurisdiction" in 1934; for example:

- continuing obligations by the United States to the tribe;[11]
- the continuing existence of a government-to-government relationship despite the federal government's mistaken belief it was terminated;[12]
- where the Tribe was the subject of a congressional appropriation or enrollment with the BIA
- cases where even later recognition decisions reflected earlier federal jurisdiction.[13]

[11] Id. at 1070 (citing Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980)) ("all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934, whether or not that obligation was acknowledged at that time").
[12] Id. (citing Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney for Western Dist. of Mich., 369 F.3d 960, 961, and n. 2 (C.A.6 2004)).
[13] Id.

The proper application of Justice Breyer's opinion by federal agencies and the correct interpretation of "under federal jurisdiction" could alleviate fall-out from the Carcieri decision and perhaps limit it to the Narragansett Tribe. Even so, such favorable determinations could face challenges by opportunistic opponents of tribal land acquisition who could delay conveyance of property to the United States for the benefit of Indian Tribes for years.

The responsibility of the Federal government over Indian tribes is historically rooted in the Indian Commerce Clause of the Constitution, which gives Congress plenary power over tribes, unrestricted authority to assert jurisdiction over Indian communities, and the ability to determine whether, to what extent, and for what time a tribal community shall be recognized.[14] Acknowledgment of a tribe implicitly recognizes that the tribe is a sovereign entity possessing all those inherent powers not otherwise inconsistent with its status as a dependent nation.[15] This wide constitutional authority is reflected in the broad jurisdictional authority of Congress over tribes, which extends to all Indian tribes, even tribes with which a government-to-government relation has not been expressly established.[16]

Against the historical backdrop of this policy and jurisprudence, instruction should be provided to interpret "under federal jurisdiction" as it appears in Section 19 of the IRA in an equally broad manner, on the understanding that, had Congress intended the statute to be construed narrowly, it would have made that desire clear. Had Congress intended to restrict Section 19, it could have used qualifying language. Or Congress could have expressly limited eligible tribes to those under formal Interior Department "supervision," "tutelage," or "guardianship," restrictive terms that appear in the legislative history of the IRA. Congress avoided such narrow language, using the broader "federal jurisdiction" based precisely on the broad scope of its authority as rooted in the Constitution.

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[14] U.S. Constitution, Art. I, Sec. 8, Cl. 3; U.S. v. Sandoval, 231 U.S. 28, 46 (1913).
[15] See Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
[16] See, e.g., Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (unrecognized tribe within federal jurisdiction for purposes of claim arising under Trade and Intercourse Act).

THE DEPARTMENT OF INTERIOR IS ILL-EQUIPPED TO CREATE AND APPLY NEW CARCIERI TESTS FOR THE DETERMINING "UNDER FEDERAL JURISDICTION"

The Department of Interior is ill-equipped to apply and construe IRA terms like "under federal jurisdiction in 1934," due to a lack of resources and an occasional history of misconstruing and limiting the IRA. For example, prior to 1994, the Interior Solicitor's Division of Indian Affairs, Tribal Government and Alaska office routinely misconstrued the IRA to contrive a distinction between what it termed "historic" tribes and so-called "non-historic" tribes - which referred to tribes originally organized as communities of adult Indians. This dubious distinction was nowhere found in the original IRA. It was also undercut by the 1988 Amendments to the IRA which deleted the language regarding "adult Indians residing on a reservation" and simply referred to tribes as "tribes." In addition, it was impliedly overruled by the definition of "tribe" in statutes such as the Indian Land Consolidation Act,[17] the Indian Child Welfare Act,[18] and other laws with broad definitions of "tribe," such as that used in the Indian Self-Determination and Education Assistance Act.[19]

The invidious distinction between historic and non-historic tribes was summarized in a now infamous Bureau of Indian Affairs letter from Acting Assistant Secretary Wyman Babby to Chairman George Miller of the House Resources Committee in 1994 (the "Babby Letter").[20] The firestorm that erupted in Indian Country as a result of this letter led concerned members of Congress to reverse the so-called distinction within months. In 1994, Congress amended the Indian Reorganization Act to prohibit the classifications asserted by the Office of the Solicitor, Division of Indian Affairs and to ensure the same rights and obligations of federal recognition that are available to all federally recognized tribes.[21] Congress also clarified that:

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[17] 25 U.S.C. §§ 2201 et seq.
[18] 25 U.S.C. §§ 1901 et seq.
[19] 25 U.S.C. §§ 450 et seq.
[20] See United States Department of Interior, Acting Assistant Secretary – Indian Affairs to Hon. George Miller (Jan. 14, 1994).
[21] See 25 U.S.C. § 476(f)-(g).

> "(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;' or by a decision of a United States court;"[22]

Moreover, in 2004, Congress again amended the IRA to ensure that the IRA did not invalidate tribal constitutions that were adopted after June 19, 1934 (the date of the original IRA) where such constitutions are adopted under a Tribe's "inherent sovereign power"[23]. Any attempt to resuscitate such distinctions between tribe's privileges, immunities and inherent powers must be prevented.

Regrettably, the Department of Interior Solicitor's Office last year lodged the 1994 Babby Letter with the United States Supreme Court after the briefing was closed in the Carcieri case (but before the decision was issued). This misleading filing was made without also lodging the 1994 privileges and immunities statute that reversed the historic non-historic tribal distinctions made in the letter. The Solicitor's Office also failed to file a July 13, 1994 memorandum from Solicitor John Leshy to Assistant Secretary Ada Deer that also recognized that Congress for the most part "makes no distinctions among Tribes." The Division of Indian Affairs incomplete lodging with the Supreme Court raises the specter that the discredited practice of classifying some tribes as "non-historic" could be revived by the Division of Indian Affairs in a new post-Carcieri analysis.

While at the Department, I also became aware of Interior Department practices in the federal acknowledgment process that if applied by the Department in the land in trust process could unduly restrict the Secretary's authority. Repeated reports of the

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[22] 25 U.S.C.A. §479a

[23] 25 U.S.C.A. §476(h), Section 103, Public Law 103-454

General Accounting Office and this Committee's own hearings demonstrate the long delays, poor staff support, and unduly restrictive interpretations of the Department's Office of Federal Acknowledgment ("OFA").[24] Transferring tribal history questions to OFA is a potential disaster in the making.

As Associate Solicitor, the Division of Indian Affairs' attorneys I supervised were not required to engage in an analysis of which tribes were "under federal jurisdiction" when considering land into trust applications for the simple reason that all tribes were presumed to be under the Secretary's trust authority, absent some express Congressional prohibition. The purpose and intent behind this long-standing practice was ignored in Carcieri.

Plainly the Carcieri decision runs directly counter to federal laws and policies that have long expressly supported self-determination for American Indian Nations. The Indian Reorganization Act of 1934 itself was intended to reverse fifty years of forced assimilation of tribes through allotment of tribal land by giving the Secretary of Interior the authority to acquire lands in trust on behalf of all Indian tribes.[25] The purpose behind the new tribal land-acquisition policy was to encourage tribal self-governance and promote tribal self-determination and economic development.

The Executive Branch has followed a similar course as Congress in supporting and promoting policies of self-determination of Indian tribes. President Clinton's Executive Order 13084 of May 14, 1998, *Consultation and Coordination with Indian Tribal Governments*, mandates that federal agencies follow principles of respect for Indian Tribal self-government and sovereignty, for Tribal treaty rights and other rights and for the responsibilities which arise from the unique federal trust relationship.[26]

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[24] See U.S. General Accountability Office, "More Consistent and Timely Tribal Recognition Process Needed," GAO 02-415T (Feb. 7, 2002); "Timeliness of the Tribal Recognition Process Has Improved, but It Will Take Years to Clear the Existing Backlog of Petitions," GAO-05-347T (Feb. 10, 2005).
[25] See General Allotment Act of 1887. 24 Stat. 388.
[26] Executive Order No. 13084, "Consultation and Coordination with Indian Tribal Governments." 63 Fed. Reg. 27655 (Apr. 14, 1998). See also President George W. Bush, "Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Government," (Sept. 23, 2004); President George H.W. Bush, Statement Reaffirming the Government-to-Government

CONGRESS MUST PROVIDE A REMEDY NOW

Congress has the opportunity and duty to Indian Tribes to solve this problem now by confirming the Secretary's authority to take land in trust for all tribes rather than allowing new and convoluted bureaucratic processes to take root. Congress should provide an immediate statutory solution that (1) makes clear that the Secretary of Interior has authority to accept land in trust for any and all federally recognized tribes; and (2) that ratifies all prior Secretarial decisions under the IRA, including trust acquisitions, that may be potentially affected by the decision.

Congress should enact new legislation that makes clear the Secretary of Interior has authority to accept land in trust for all federally-recognized Tribes irrespective of a determination of whether or not they were under federal jurisdiction in 1934. While we wait for Congress to review the legislative record to restore the Secretary's authority, we cannot forget that legislative direction to federal agencies is necessary today. The Secretary of Interior can make clear today that nothing from the Carcieri decision will disturb prior trust land acquisitions. For example, The Quiet Title Act contains an Indian land exception that expressly precludes lawsuits challenging the United States' title to "trust or restricted Indian lands."[27] All acquisitions prior to Carcieri should therefore continue to enjoy full effect and all future agency activities related to these lands must proceed as properly authorized.

In the meantime this Committee could also give important direction to the Secretary of Interior, Chairman of the National Indian Gaming Commission and Attorney General to interpret the Carcieri decision in the most legally permissible fashion possible,

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Relationship between the Federal Government and Tribal Governments (June 14, 1991); President Ronald M. Reagan, Statement on American Indian Policy (Jan. 24, 1983), in 19 Weekly Comp. Pres. Doc. 98; President Richard M. Nixon, Special Message on Indian Affairs, in Public Papers of the Presidents of the United States: Richard Nixon, pp. 564-67, 576.

[27] 20 U.S.C. §2409a. See also Sac & Fox Nation of Missouri v. Salazar, No. 08-3277 (10th Cir. Mar. 3, 2009); Neighbors for Rational Development, Inc. v. Norton, 379 F.3d 956 (10th Cir. 2004).

especially with respect to the standard to be applied for what tribes should be considered “under federal jurisdiction” after Carcieri.

Thank you for the opportunity to testify today and I look forward to answering any questions the Committee has today or may submit in writing.

EXHIBITS

Exhibit A	25 U.S.C.A. § 476 Privileges and immunities of Indian tribes, Tribal sovereignty
Exhibit B	25 U.S.C.A. § 479 Definitions
Exhibit C	25 U.S.C.A. § 479a Federally Recognized List Act of 1994
Exhibit D	U.S. Const. Article I, Section 8, Clause 3 Indian Commerce Clause
Exhibit E	July 13, 1994 Memorandum to Ada E. Deer, Assistant Secretary- Indian Affairs from JohnD. Leshy, Solicitor, regarding amendment of the Indian Reorganization Act

EXHIBIT A

25 U.S.C.A. § 476 (*partial*)

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act--

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

EXHIBIT B

25 U.S.C.A. § 479

The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term “tribe” wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words “adult Indians” wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

EXHIBIT C

25 U.S.C.A. § 479a

For the purposes of this title:

(1) The term “Secretary” means the Secretary of the Interior.

(2) The term “Indian tribe” means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term “list” means the list of recognized tribes published by the Secretary pursuant to section 479a-1 of this title.

Relevant Findings of 25 U.S.C.A. § 479a

Section 103 of Pub.L. 103-454 provided that: “The Congress finds that--

“(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated ‘Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;’ or by a decision of a United States court;”

EXHIBIT D

United States Constitution, Article I, Section 8, Clause 3

The Congress shall have power . . .

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

United States Constitution, Article II, Section 2, Clause 2

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur....